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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY
Appellant

v.

LLOYD M. CRENSHAW
Appellee

On Appeal from the Supreme Court
of Mississippi

BRIEF OF AMICI CURIAE CONSUMERS UNION OF U.S., CONSUMER FEDERATION OF AMERICA AND NATIONAL CONSUMERS LEAGUE IN SUPPORT OF APPELLEE

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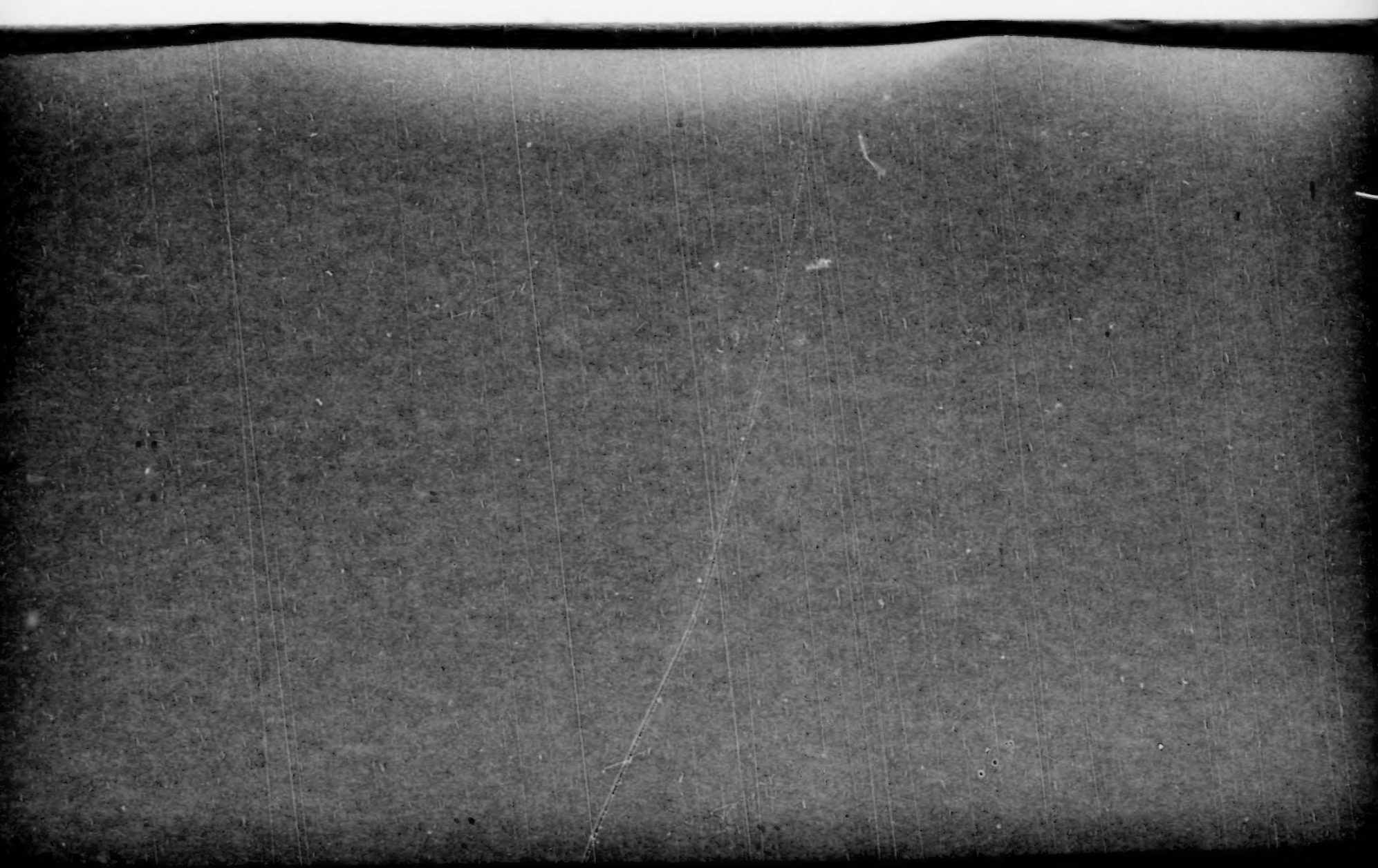

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STATEMENT OF CONSENT

The Consumers Union of United States, Inc., the Consumer Federation of America, and the National Consumers League have obtained consent from all parties to this case to submit this brief, and they have filed the consent letters with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

Consumers Union is a non-profit membership organization founded in 1936. It engages regularly in consumer advocacy before the executive, judicial, and legislative branches of government.

Consumer Federation of America is a coalition of over 200 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 30 million people in matters pertaining to the well-being of the American consumer.

The National Consumers League has

worked for safety and fairness of consumers and workers since 1899. The League seeks to insure that consumer and worker protections are enforced and updated by supporting necessary legal action.

The Consumers Union, Consumer Federation of America, and the National Consumers League are deeply concerned about insurance practices and the role punitive damages play in assuring a responsive and consumer-oriented insurance industry. Members of each organization have insurance similar to the appellee. It is in the interest of the members of each organization to maintain a strong tort system including a mechanism that permits punitive damages in appropriate circumstances. Without such a system, the members of these organizations will be denied an essential private sector ordering mechanism, resulting in the potential for increased insurance rates, poor customer

service, and an economic incentive to reject legitimate claims. Maintenance of the Mississippi tort system, including punitive damages, serves the interests of Consumers Union, the Consumer Federation of America, and the National Consumers League.

SUMMARY OF ARGUMENT

This case concerns the propriety of punitive damages under Mississippi tort law. It is contended that punitive damages awarded under that system violate the Eighth Amendment prohibition against excessive fines.

The Eighth Amendment derives from the English Bill of Rights, and the English Bill of Rights articulates certain values found in the Magna Carta. Neither the Magna Carta, the English Bill of Rights, nor the Eighth Amendment impose any constraints on private tort law judgments. All three documents address the rela-

tionship between the executive and the citizenry.

The English Bill of Rights and the Eighth Amendment prohibit the executive branch from imposing harsh or excessive sanctions in criminal cases. The relevant provision of the Magna Carta permits the King to collect amercements (fines or specialized taxes) only if a jury of peers determines the amount to be amerced. Amercements were to be proportional to the harm done to the King and bore no relationship to the embryonic civil tort system.

The conclusion that a civil damage proportionality requirement can be generalized from these historic documents is counter to history. All Commonwealth countries apply these documents to their legal systems, and all have punitive damages without any reference to this view of history.

The Eighth Amendment applies to criminal sanctions. It can be applied to civil fines imposed by the legislature if the purpose and effect of those fines parallels precisely the criminal law in all respects. Punitive damages are civil; to apply the Eighth Amendment it must be established that they are for all purposes a criminal sanction. That conclusion contravenes 200 years of caselaw, ignores findings by this Court declaring punitive damages to be part of traditional state law, ignores the fact that punitives are not legislative in origin, and ignores the full range of purposes underlying punitive damages.

If this Court decides to review punitive damages on the merits, the Mississippi system will survive scrutiny. Punitive damage awards made by properly instructed juries and subject to remittitur and appellate review comport with

due process. A fixed ratio between punitive damages and compensatory damages is arbitrary and unfair. Punitive damages punish gross misconduct, deter future misconduct, and serve other functions central to the civil tort system. To preserve the constitutional and beneficial system of punitive damages, the decision of the Mississippi Supreme Court should be affirmed.

ARGUMENT

I

NEITHER BRITISH HISTORY NOR PRECEDENT SUPPORTS THE PROPOSITION THAT THE AMERCEMENTS CLAUSE IN THE MAGNA CARTA HAD THE PURPOSE OR EFFECT OF LIMITING CIVIL DAMAGES

A. The Magna Carta Did Not Articulate Requirements Applicable to Disputes Between Private Parties.

The appellants contend that the proportionality requirement in the Amercements Clause of the Magna Carta (Chapter 20) establishes a fundamental axiom applicable to modern civil punitive damage verdicts. This premise is highly ques-

tionable, based on a review of the history at the time of the Magna Carta, the English Bill of Rights, the Eighth Amendment, and modern caselaw.

There is little question that amercements were fines payable to the King. They were not payable to private parties. Amercements coexisted with civil damages. "The distinction between amercements and damages is well known. The former were payable to the Crown after legal action or for an error or ineptitude which took place in its course; the latter represented the loss incurred by a litigant through an unlawful act. They were payable to [the private litigant]. . . ." 62 Selden Society, Introduction to the Curia Regis Rolls, 1199-1230 A.D. 463 (C.T. Flower ed. 1944) [hereinafter C.T. Flower].

Sums payable through amercements were not remedies to settle disputes between

private plaintiffs and private defendants. Private disputes that resulted in civil damages, particularly pertaining to disseisin, were somewhat unusual in the thirteenth century, though there are numerous recorded cases. C.T. Flower, supra, at 473-479. When parties were aggrieved by serious misconduct, a punitive judgment could be imposed: "And so in a characteristically English fashion punishment was to be inflicted in the course of civil actions: it took the form of manyfold reparation, of penal and exemplary damages." 2 F. Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I [1239-1307] 522 (2nd ed. 1911) (emphasis added). Similarly, civil damages could reflect a "moral" judgment pertaining to misconduct. C.T. Flower, supra, at 475. A separate system of civil justice that emerged later through the dominant writ of trespass and

that was designed to provide money damages to aggrieved parties was in its embryonic stage in the thirteenth century. Pollock & Maitland, supra, at 523.

Many civil actions concluded with separate awards for civil damages to be paid to the private litigant and an amercement or court fee to be paid to the justice or court. C.T. Flower, supra, at 465 et seq.; A. Harding, A Social History of English Law 61 (1966). The sums payable for amercements were guided by Chapter 20 of the Magna Carta; in contrast, civil damages paid to the private litigant "were much less standardised." C.T. Flower, supra, at 473. Civil damages in these earliest of tort actions "vary widely; and then, as now, their assessment must have been difficult." C.T. Flower, supra, at 476.

Chapter 20 of the Magna Carta placed limits on the amercement or fining power

of the King. Among other things, the clause requires proportionality and dictates that "the amercement should be in proportion to the wrong done; . . . this meant the wrong done to the lord or the court, and not to the other party to litigation in that court." 80 Selden Society, Novae Narrationes cci (S.E. Shanks ed. 1963) (emphasis added).[1] Thus, the executive abuse inherent in amercements related to extortive practices by the King. Such control was accomplished through the proportionality requirement and by assuring that a jury rendered a

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[1]This concept is central to the case before the Court. It underscores the proper meaning of amercements or fees payable to the King. The source, Selden Society, Novae Narrationes, supra, at cci, indicates this interpretation derives from Natura Brevium and Fitzherbert, Grand Abridgement of the Laws of England (1514). These sources are based on original case material from Bracton's authoritative work on the thirteenth century. "[I]t is ultimately to Bracton and to Bracton alone that we must look for an account of this period [1216-1272]. . . ." 2 W. Holdsworth, A History of English Law 286-88 (1923).

determination on the amount of an amercement, as opposed to a judge of the court of the King. The sole function of the court was to declare that an amercement or fine was due, at which point it became the obligation of the jury to fix the amount. W. Walsh, A History of Anglo-American Law 309 (1932); 4 W. Blackstone, Commentaries *372-3.

The desire to control executive excesses was borne of the fact that the amercement "system" involved fines and taxes imposed by the executive for the purpose of generating revenue. Amercements could be imposed on an individual, or used as a tax generally, "laid upon the County, Hundred, or Wapentake as a whole. . . ." 2 Vinogradoff, Oxford Studies in Social and Legal History, Customary Rents 186 (1974). A great concern underlying the Magna Carta was that the Kings' bench could amerce an entire community. 2 F.

Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I 493 (2nd ed. 1923). "[T]he fines and amercements were another branch of the King's revenue. . . ." The Oxford English Dictionary, Vol. I, 279 (1971). The relationship to be confined, therefore, was between the King and the various communities, not, as the appellants' argument implies, between two private persons involved in a legal dispute.

The barons who pressed the Magna Carta on the King did so because "he had been violating the law in his conduct towards them . . . [and] they had learned that they could not trust him. . . ." G. Adams & R. Schuyler, Constitutional History of England 128 (1935). The concern was that the King and his courts through the force of office would be able to implement a public law system, and particularly a taxation system, that could

cripple the baronage. It was that sentiment that led to the adoption of Chapter 20 regarding amercements, and 473 years later led to the adoption of an excessive fines clause in the English Bill of Rights that was again designed to control the executive excesses of the King. 6 W. Holdsworth, A History of English Law 232 (1924).

B. The Magna Carta Was a Public Law Document.

It is contrary to history to assert that the Magna Carta was designed to have an impact on the damage awards payable to private persons. The "Magna Carta was an instrument of public law; little place will be found in it for private law principles." Lobingier, The Laws of England in the Thirteenth Century With a New Interpretation of the Barons' Reply at Merton 4 (n.d.). William Holdsworth warned legal historians against such overextrapolation of the meaning of the

Magna Carta: "Like all documents which have attained not merely fame but sanctity, it has become the source of dogmas and doctrines of which its framers never dreamt; and an attempt to ascertain the meaning which the men of 1215 attached to some of its more famous clauses, no doubt would, if it were a theological document, be denounced as blasphemous." 2 W. Holdsworth, A History of English Law 209 (1923).

This is not to suggest that the Magna Carta was inapplicable to private persons, but rather to suggest that it was applicable to transactions between private persons and the King. Similarly, it is not suggested that excessive amercements were not a problem; indeed they were. Amercements were assessed as taxes for a series of real or imagined transgressions of the King's interests. These included "false verdicts, the variation of pleas or

verdicts, contempt of court and some minor offenses, which can be brought together as breaches of etiquette." C.T. Flower, supra, at 469. In many cases, both plaintiff and defendant were amerced, highlighting the inapplicability of the amercements clause restraints to private civil actions. C. Kinnane, A First Book on Anglo-American Law 272 (2nd ed. 1952). The simple fact is that the Magna Carta did not address relations between and among private persons. For example, as to the nonperformance of contract or unlawful debt, "the Charter laid down nothing." And as to most other matters, the Charter "only touched the fringes. . . ." J.C. Holt, Magna Carta 232 (1965).

From all this, several things are clear. First, a control on amercements was a control on executive authority, not a dictate regarding private damages. Second, the drafters of the Magna Carta

had tremendous faith in the jury and directed that juries determine amounts for amercements and damages, recognizing full well the lack of certainty in that process. Third, the Magna Carta did not apply to damages paid to private persons but applied exclusively to the activities of the King. It is no accident of history that the Magna Carta was written by barons who sought to control executive authority, that the English Bill of Rights was written by those who sought to control the "perversions of judicial prerogatives of the Crown" by creating prohibitions on "excessive fines," 6 W. Holdsworth, A History of English Law 232 (1924), and that the Bill of Rights of the United States Constitution was written to address the concerns of antifederalists who feared the excesses of an overreaching and intrusive federal government. In sum, the historical antecedents leading to the English

Bill of Rights and the Eighth Amendment excessive fines clause suggest exclusively a desire to control executive authority and in no way suggest a desire to control the ability of an individual state to implement a punitive damage system in cases between private persons.

C. The Law Pertaining to Punitive Damages in Commonwealth Countries Is Not Constrained by the Magna Carta.

In the last century, the policies underlying punitive damages have been debated openly in Great Britain. Neither the Magna Carta nor the English Bill of Rights has played a role in this analysis.

In Great Britain, exemplary damages "are awarded to teach the defendant that 'tort does not pay' and to deter him and others from similar conduct in the future." Clerk & Lindsell, The Law of Torts 242-43 (15th ed. 1982). Punitive damages are provided "to punish the defendant in an exemplary manner, and

vindicate the distinction between a willful and innocent wrongdoer." 2 J. Saunders, Words and Phrases Legally Defined 5 (1969).

In Rookes v. Barnard, [1964] A.C. 1129, [1964] I All E.R. 367, the House of Lords placed limits on punitive damages by confining the categories in which punitive damages may be awarded. Rookes permits punitive damages where there has been arbitrary or abusive behavior by a government servant, where a defendant has profited substantially by engaging in misconduct, or where a statute authorizes punitive damages. Rookes v. Barnard, supra, [1964] A.C. at 1226-27, I All E.R. at 410-11. These limitations, however, have had little effect on the ability of juries in Great Britain to award supplemental damages, since "aggravated damages" are available in most civil actions for tort, and can be given "to soothe the injured

feelings of a plaintiff, . . . [for] insolence or arrogance" or similar reasons. G. Williams & B. Hepple, Foundations of the Law of Tort 69 (1976); see J. Fleming, The Law of Torts 584-85 (5th ed. 1977), in which the author notes the similarity between exemplary damages and aggravated damages.

The limitation in Rookes has been considered in the major common law jurisdictions that apply Magna Carta and English Bill of Rights principles, including Australia, Canada, Ireland, and New Zealand. Each country has rejected the Rookes limitations,[2] giving the doctrine of punitive damages a "wider interpretation." Owen, Punitive Damages in Products

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[2]Australia, Uren v. John Fairfax & Sons, [1967] A.L.R. 25; Canada, McElroy v. Cowper-Smith & Woodman, [1967] 62 D.L.R. (II) 65; McKinnon v. F.W. Woolworth Co., [1968] 70 D.L.R. (II) 280; Bahner v. Marwest Hotel Co., [1969] 6 D.L.R. (III) 22; New Zealand, Fogg v. McKnight, [1968] N.Z.L.R. 330.

Liability Litigation, 74 Mich. L. Rev. 1257, 1264, n.23 (1976). Prior to Rookes v. Barnard, British courts considered punitive damages at great length and in detail. In each instance, punitive damages were found to be fundamental to the British legal system.[3] So deeply entrenched is the doctrine of punitive damages in Great Britain that Lord Demming refused to follow the limitations of Rookes v. Barnard in his decision to award punitive damages in Broome v. Cassell & Co., [1971] II Q.B. 364, 368-69. This refusal to follow Rookes was rebuked on appeal. Cassell & Co. v. Broome, [1972] A.C. 1027.

Without going further into the intricacies of British legal doctrine, it is

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[3]See Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd., [1934] 50 T.L.R. 581, 582; Rook v. Fairrie, [1941] I K.B. 507, 516; Knuppfer v. London Express Newspapers Ltd., [1943] I K.B. 80, 85; Lewis v. Daily Telegraph, [1963] I Q.B. 340, 381; E. Hulton & Company v. Jones, [1910] A.C. 20, 25.

clear that punitive or exemplary damages are alive and well in Commonwealth countries. The 1964 Rookes limitations are the result of the intrusive role played by the higher British courts in the affairs of inferior courts and have nothing to do with the constitutional or historical contentions of the appellant. In the absence of a federal system, it is not uncommon for the House of Lords to engage in a review of jury verdicts. In contrast, it would be most unusual for the United States Supreme Court to become involved in a day-to-day assessment of jury verdicts in civil punitive damage cases, determined under state law, involving two private parties.

II

THE PROHIBITIONS OF THE EIGHTH AMENDMENT ARE APPLICABLE TO CRIMINAL SANCTIONS. PUNITIVE DAMAGES ARE NOT CRIMINAL SANCTIONS.

A. The History of the Excessive Fines Clause of the Eighth Amendment Suggests that the Framers Intended to Keep in Check the Power of the Executive to Impose Excessive Fines in Criminal Cases.

The history of the excessive fines clause in the English Bill of Rights is straightforward: the drafters were concerned with "[t]he recent perversions of the judicial prerogatives of the Crown." 6 W. Holdsworth, A History of English Law 232 (1924). Their concerns focused on the mode of criminal punishment, controlling excessive bail and fines, and placing controls on the use of criminal treason trials. Holdsworth, supra, at 233-34, 410-12. Justice Story's treatise on the U.S. Constitution demonstrates the effect of the British experience on the U.S. Bill of Rights: "It was, however, adopted as

an admonition to all departments of the national governments, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." 2 J. Story, Commentaries on the Constitution of the United States 623-24 (4th ed. 1873) (footnote omitted). The English Bill of Rights is the direct source of the Eighth Amendment.

It has been argued that the excessive fines clause of the Eighth Amendment applies to civil proceedings, notwithstanding the history of the English Bill of Rights. However, in Ingraham v. Wright, 430 U.S. 651, 665-66 (1977), this Court analyzed the history of the Eighth Amendment, paying particular attention to the question of whether it applied to matters beyond criminal prosecutions. The case holds that the three clauses of the amendment were designed "to limit the

power of those entrusted with the criminal-law function of government." 430 U.S. at 664. Making reference to an earlier draft of the Eighth Amendment that explicitly included a "criminal case limitation on the Eighth Amendment," this Court held:

> [A]lthough the reference to 'criminal cases' was eliminated from the final draft, the preservation of a similar reference in the Preamble (footnote omitted) indicates that the deletion was without substantive significance. . . . [T]he principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments. . . . But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply--the criminal process--was the same.

430 U.S. at 665-66. Quite obviously, the Eighth Amendment was read by this Court as applicable only to criminal cases.

The conclusions of this Court in Ingraham are consistent with the histori-

cal perspective of the amendment.[4] It is difficult to identify any original source material devoted exclusively to the excessive fines clause, since most of the principals were arguing for an amendment to control criminal sanctions and thus did not address individually fines, bail, or punishment. Typical of this dialogue is the commentary of Brutus II (penname of Melanthon Smith, a New York State anti-federalist strategist), who wrote that adoption of the Bill of Rights was essential "for the security of life, in criminal prosecutions, ..." To accomplish this objective, Smith sponsored an amendment that guaranteed that "excessive bail

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[4] See R. Perry & J. Cooper, Sources of Our Liberties, Documentary Origin of Individual Liberties in the United States Constitution and Bill of Rights 238 (1972); B. Schwartz, A Commentary on the Constitution of the United States (pt. 3) p. 754 (1968), discussing the Eighth Amendment prohibitions as a cure for problems relating to "monetary fines as penalties for criminal offenses."

should not be required, nor excessive fines imposed."[5]

It is illogical to assert that a clause designed to control the criminal enforcement power of the federal government has an original meaning that allows it to be used to place controls on one state's implementation of its civil justice system. It is certainly understandable that parties confronted with civil fines or punitive damages would seek constitutional protection. However, civil sanctions are the province of the state courts and legislatures and are not matters for assessment under the Eighth Amendment excessive fines clause.[6]

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[5]Brutus II, To the Citizens of the State of New York, New York Journal, November 1, 1987, reprinted in 13 The Documentary History of the Ratification of the Constitution, 1 Commentaries on the Constitution: Public and Private, 21 February to 7 November 1787, pp. 524, 527 (Kaminski & Saladino eds. 1981).

[6]City of Scranton v. Peoples' Coal Co., 274 Pa. 63, 117 A. 673, 676, (1922); Dalton v. Bob (cont'd)

B. Punitive Damages Are Not Criminal Sanctions.

In Solem v. Helm, 463 U.S. 277 (1983), this Court held that the principle of proportionality should be applied to criminal sentences assessed under the Eighth Amendment. United States v. Ward, 448 U.S. 242 (1980), permits certain proceedings labeled "civil" to be analyzed as if they were "criminal" for purposes of Eighth Amendment review, raising two central questions for this case. First, are punitive damages criminal sanctions, thus activating the principle of proportionality? Second, should the Court find punitive damages are in the nature of criminal sanctions, does the Mississippi scheme for imposing punitive damages pass constitutional muster? See Discussion, Part III, infra.

Neill Pontiac, Inc., 476 F. Supp. 789, 797, n.13 (M.D.N.C. 1979); Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir. 1967); United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957).

Punitive damages serve multiple purposes including punishment, a function also served by the criminal law. The mere fact that one of the purposes underlying punitive damages is similar to one of the purposes underlying criminal law does not change the stark legal fact that punitive damages are recognized to "have long been a part of traditional state tort law." Silkwood v. Kerr-McGee, 464 U.S. 238, 255 (1984).

Implicitly, Silkwood allows for the recognition of different protective regimes within our legal system. In limited circumstances, punitive damages are available to private persons who have been wronged by gross misconduct. Civil fines address governmental needs, insuring the implementation of legislatively-mandated

behavioral norms,[7] and are subject to scrutiny by the federal courts, while punitive damages are subject to scrutiny pursuant to state tort law principles. 464 U.S. at 257.

To move punitive damages into the domain of civil fines and then move civil fines into the domain of criminal fines would require large jurisprudential leaps, ignoring whole blocks of established precedent. Recently the Court made quite a clear distinction between fines "paid to the state as an abstract and impersonal entity, often calculated without regard to the harm the defendant has caused . . . ," Kelly v. Robinson, ___ U.S. ___, 107 S.Ct. 353, 361, n.10 (1986), and punitive damages, referred to as a system of "wholly private penalties. . . ." 107 S.Ct. at

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[7] 42 U.S.C. § 2011 et seq. (1976 ed. and Supp. V) provides the Nuclear Regulatory Commission with the ability to seek civil fines for noncompliance with various rules pertinent in the Silkwood case.

362, n.13. The notion that punitive damages are wholly different than civil or criminal fines is common to our jurisprudence.[8]

In San Francisco Civil Service Assn. v. Superior Court of Marin County, 16 Cal. 3d 46, 127 Cal. Rptr. 131, 544 P.2d 1331 (1976), the court confronted the question of whether civil fines for raw sewage discharge were similar in character to punitive damages. The court held that a civil fine could "be imposed upon a public entity because the monies thereby collected civilly are not punitive damages. . . ." 16 Cal. 3d at 49, 127 Cal. Rptr. at 134, 544 P.2d 1334. This position is reflected in the Restatement (Second) of

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[8] In Palmer v. A.H. Robins, 684 P.2d 187, 217 (Colo. 1984), the Colorado Supreme Court was asked to analogize a punitive damage system to a fine system without limits. The court found the excessive fines clause "has no application to a civil proceeding involving a punitive damage claim ancillary to a civil cause of action."

Torts: "Punitive damages are to be distinguished from qui tam awards and civil penalties or forfeitures." § 908 Restatement (Second) of Torts, comment a (1977).

A transformation of punitive damages from a civil to criminal sanction can occur if it is clear that the legislative sanction was written with the purpose of establishing a penalizing mechanism and is overtly punitive in purpose and effect based on the precedent and history of the sanction. United States v. Ward, 448 U.S. 242, 248-49 (1980). To succeed in this metamorphic venture, the appellant must establish by "only the clearest proof" that the state legislature had engaged in a drastic form of mislabeling. Cf. Fleming v. Nestor, 363 U.S. 603, 617 (1960).

It is hard to see how punitive damages can be considered criminal, based on the above proof standard, particularly

since this Court has recently held that they are "part of traditional state tort law" and that they are not civil fines. Silkwood, 464 U.S. at 255. They are not legislatively-created sanctions. They are the consequence of state common law. They derived from the system of private wrongs, not public wrongs. There is not a single instance in all of American jurisprudence in which a court has accepted the proposition that a state common law tort remedy (not a legislative sanction) could somehow be recharacterized as a criminal sanction. To blur the distinction between civil private redress and criminal sanction would throw our jurisprudence back to the thirteenth century, to a time where the distinctions between civil law and criminal

law, public fines and private remedies, were difficult to delineate.[9]

It has been argued in prior cases that punitive damages are similar to criminal sanctions and that this imposition would offend double jeopardy prohibitions, if there is a state criminal prosecution addressing the same misconduct. The profound distinction between private civil punitive damages and criminal enforcement, however, prompts many courts to take the position that "when exemplary damages are justified, they

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[9]Normally, to be covered under the excessive fines clause, the fine must be "money exacted from a person guilty of a crime as pecuniary punishment." South Carolina State Highway Dept. v. Southern Ry., 239 S.C. 227, 122 S.E.2d 422, 424 (1961). From the broader perspective of a state "excessive fines" clause, the fine must be a "penalty exacted by the state for some criminal offense." State of Montana v. State Board of Equalization, 133 Mont. 43, 319 P.2d 1061, 1063 (1958). Even so, it has been suggested that if a court were to characterize punitive damages as a civil penalty, "the Eighth Amendment argument is inapposite." United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957).

should not be withheld merely because a civil or criminal penalty has been or may be imposed." Security Aluminum Window Mfg. v. Lehman Associates, 108 N.J. Super. 137, 260 A.2d 248, 254 (1970). A number of jurisdictions allow juries to consider the fact of criminal prosecution in assessing the amount of punitive damages, e.g., Hanover Insurance v. Hayward, 464 A.2d 156, 159 (Me. 1984).

As a matter of policy and practice, there are significant differences between the objectives underlying criminal law enforcement and civil punitive damages.[10] First, criminal enforcement is intended to punish those who have violated rules pertinent to the public at large. Punitive damages redress a violation of a private nature. Second, criminal enforce-

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[10]These are discussed in greater detail in Part III. However, these "beneficial" aspects of punitive damages highlight the difference between punitive damages and criminal enforcement.

ment holds the possibility of the denial of liberty interests, a matter that cannot be readily equated with any form of civil sanction. Third, criminal enforcement in the area of insurance bad faith is almost nonexistent, thus providing only the most theoretical deterrent.[11] In contrast, punitive damages have had a substantial and beneficial effect on practices in the insurance industry. Fourth, punitive damages accommodate a retributive interest

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[11] See generally Levine, Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions, 13 U.S.F. L. Rev. 613, 619-20 (1979). Appellants argue that punitive damages ought to be awarded, if at all, in proportion to the Mississippi criminal sanctions pursuant to Miss. Code Ann. § 83-5-33 (1972), although this statute does not cover insurance bad faith nonpayment based on a plain reading of Miss. Code Ann. 83-5-35, which defines "deceptive practices." Further, there is no record that reveals whether any statutory criminal enforcement has ever occurred in the bad faith area. Finally, the lack of criminal enforcement in the insurance bad faith area is readily ascertainable in many states. See, e.g., 14c Tex. Ins. Code Ann. § 21-21-2 (Vernon 1981); N.Y. Ins. Law § 2601 (Consol. 1985); La. Rev. Stat. Ann. § 1214 (West 1978); Mass. Ann. Laws. Ch. 176d § 3 (1987).

unmet in criminal enforcement. Unlike the criminal justice system, where fairness concerns make it difficult for certain types of victims even to be heard in court, the civil punitive damage system provides victims with recourse based on the nature of the wrongfulness of the act occasioned upon them. Booth v. Maryland, 55 U.S.L.W. 4836 (U.S. June 15, 1987).

C. Punitive Damages Are Part of Our Common Law Heritage.

In Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851), this Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated. Further, the Day Court suggested that punitive damages were not "criminal in character." Id. In Missouri Pacific Ry. v. Humes, 115 U.S. 512, 521 (1885), this Court approved the use of punitive damages to "blend together the interests of society and the aggrieved individual." The Court went on to note

that such awards were a matter for the jury and were not bound by "very definite rules," yet "the wisdom of the practice" was not debatable. Quite clearly, the nineteenth century view of punitive damages was that the doctrine was "too well settled now to be shaken, that exemplary damages may in certain cases be assessed." Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 492 (1875). State courts reflect the same perspective, finding punitive damages appropriate based on the manner in which an injury was inflicted "whether by negligence, wantonness, or with or without malice." Fleet & Semple v. Hollenkemp, 52 Ky. (13 B. Mon.) 175, 180 (1852); Merrells v. The Tariff Mfg. Co., 10 Conn. 388 (1835); Linsley v. Bushnell, 15 Conn. 225 (1842).

This Court considered the constitutionality of punitive damages in Minneapolis & St. Louis Ry. v. Beckwith, 129

U.S. 26, 36 (1889), holding: "The imposition of punitive or exemplary damages . . . cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." These holdings reflect the history of punitive damages. Looking to the legal systems in the United States, Great Britain, and even to Roman law, it is evident that punitive damages are a fundamental part of our jurisprudence.[12]

More recently, this Court allowed the use of punitive damages against law enforcement officers even though such damages might have a chilling or intimidating effect on certain law enforcement functions. In Smith v. Wade, 461 U.S. 30 (1983), this Court determined that puni-

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[12] D. Pugsley, The Roman Law of Property and Obligations 31 (1972); B. Nicholas, Roman Law 210 (1962); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1262, n.17 (1976); The Vitality of the Doctrine of Punitive Damages in Maine, 35 Me. L. Rev. 447, 451 (1983).

tive damages could be awarded by a jury in actions brought pursuant to 42 U.S.C. § 1983 (1982). The opinion does not address the question of damage limits, though it does confirm the validity of punitive damages as a deterrent to misconduct. 461 U.S. at 36-37, n.5.

An equally difficult but substantively different application of punitive damages occurs in the area of defamation. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court considered the chilling force of punitive damages in defamation cases, and determined that such awards were proper so long as the state applied the conventional malice test used in this area even when dealing with private plaintiffs. This standard was modified in Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), permitting punitive damages without a finding of actual malice so long as the

speech does not involve matters of public concern.

Both Smith v. Wade and Gertz permit an endorsement of punitive damages in extraordinarily complex policy settings, and both cases maintain punitive damages without damage proportionality rules even though there are powerful contrary federal policy considerations. Given that history, one is hard pressed to see why punitive damages ought to be prohibited or modified in a state insurance bad faith case where there are no overt federal interests.

III

PUNITIVE DAMAGES PLAY A VITAL ROLE IN THE AMERICAN CIVIL TORT SYSTEM. A DECISION CURTAILING PUNITIVE DAMAGES WOULD HAVE A SEVERE AND ADVERSE EFFECT ON THE AMERICAN CONSUMER.

Punitive damages are a civil remedy available to private parties and are not the proper subject for review under the Eighth Amendment excessive fines clause.

Outside of apparent constitutional interests, such as implementation of federal civil rights laws or First Amendment matters, punitive damages are best left to the decisionmaking of each individual state. However, should this Court determine that a substantive review of punitive damages is in order, then the following concerns become relevant.

A. A Fixed Limit or Preestablished Ratio for Punitive Damages Would Frustrate the Purposes Underlying Punitive Damages.

A decision that compels the states to establish fixed ratios or clearly-delineated proportions in punitive damages would allow business interests to calculate easily the proper sum to be set aside to accommodate judgments. This would have a disastrous effect on the deterrent value of punitive damages. "Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and

their resulting limited compensatory expenses. They must know that their financial existence may be threatened by the evil they contemplate." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 833 (1987).

The lack of preestablished ratios has been considered by the courts in the past. In many cases courts favor an individualized punitive damage system not bound by mathematical equations. "The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish, and . . . the amount which must be awarded. . . ." Campus Sweater & Sportswear Co. v. M.V. Kahn Construction

Co., 515 F. Supp. 64, 106 (D.S.C. 1979).[13] Other courts[14] have struggled to find a proper calculation mechanism but have come up empty handed:

> Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so.
>
> Although we may now live in a highly computerized society, it is important to recognize that the justice system need not and should not mirror a mechanistic view of life. . . . Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damage awards, applying those factors in the customary manner to reach what we believe is a decision consistent with precedent.

Devlin v. Kearney Mesa AMC/Jeep Renault,

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[13] See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180-81, n.9 (1931), rejecting proportional ratios as "arbitrary"; Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1258, 1316 (1976), rejecting ratios due to their failure to take into account appropriate damage factors.

[14] Linsley v. Bushnell, 15 Conn. 225, 235 (1842), "there is no rule of damages fixed by law" to accommodate punitive damages.

155 Cal. App. 3d 381, 202 Cal. Rptr. 204, 209 (1984).

Many states follow the lead of the Mississippi courts:

> [There] is no inflexible guide by which the jury can be conducted to their determination of the amount of the penalty which must be inflicted to adequately punish the culprit and protect the public. . . . They [the jury] cannot be directed or required to award any sum in punitory damages, no matter how flagrant the transgression of private or public right. . . .

Yazoo & M.V.R. Co. v. Williams, 87 Miss. 344, 39 So. 489, 492 (1905).[15]

Although this Court has not addressed the matter specifically, it has suggested that a plaintiff's entitlement to the

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[15] See Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961); Foster v. Floyd, 276 Ala. 423, 163 So. 2d 213 (1964); Note, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 Pac. L.J. 823, 852 (1979); Borowsky, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 164-65 (1983), condemning the reasonable relation rule as a decisional pretext; Restatement (Second) of Torts § 908, comment c (1977), permitting substantial punitive damages where actual damages are nominal.

"recovery of uncertain damages" is not flawed constitutionally and that defendants are entitled to certainty in ascertaining what conduct is wrong, but they are not entitled to certainty "in respect to [the] . . . amount" of damages. Story Parchment v. Patterson Parchment Paper, 282 U.S. 555, 562 (1930). Recently, this Court characterized punitive damages as a "legal remedy that is not a fixed fine." Tull v. United States, ___ U.S. ___, 107 S.Ct. 1831, 1838, n.7 (1987). Tull follows well established precedent that defendants have no particular entitlement to a fixed maximum in cases where punishment is in the form of a fine. Standard Oil Co. of Indiana v. Missouri, 224 U.S. 270, 286 (1911) (applying this principle in a quo warranto proceeding). Accordingly, the lack of a fixed limit on a fine does not present any constitutional infirmity.

If the essence of the appellants' contention is that a punitive damage award without a clear limitation is unconstitutional, the overwhelming body of authority rejects that proposition. Finally, a fixed ratio or set sum creates the very real possibility that punitive damages will be awarded irrationally, since the amount of compensatory damages, the likely multiplier, bears little relation to the degree of culpability of the actor.[16]

B. It Is Appropriate That Punitive Damages Are Provided to the Plaintiff.

It has been argued that the sole function of punitive damages is punishment and deterrence. However, a careful inquiry into the field of punitive damages reveals that they serve multiple purposes.

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[16] A ratio rule "undermines the deterrent effect of punitive damages by stressing the actual resulting harm rather than the social undesirability of the defendant's conduct." Comment, Punitive Damages: An Appeal for Deterrence, 61 Neb. L. Rev. 651, 676 (1982).

There is little question that punitive damages provide resources to an aggrieved plaintiff who, through no fault of his or her own, has been thrust into an abnormal risk category.

Individuals who suffer at the hands of others whose behavior is sufficiently bad to be characterized as gross or wanton misconduct are in no way winners of some bizarre lottery. The destruction of family life, the trauma of protracted litigation, the displacement of emotional equilibrium, and various costs[17]

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[17]In some states, notably Connecticut, punitive damages are permitted explicitly for the purpose of assisting with attorneys fees so long as they do not exceed two times compensatory damages. The general rule in that state is that punitive damages are "essentially compensatory, not punitive. . . ." Lanese v. Carlson, 32 Conn. Supp. 163, 344 A.2d 361, 364 (1975); Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692 (1930). Other jurisdictions allow punitive damages for "inconvenience, reasonable attorneys fees, and other losses too remote to be considered under actual damages." Pan Am Petroleum v. Hardy, 370 S.W.2d 904, 908 (Tex. Civ. App. 1963). Beyond deterrence and punishment, Mississippi recognizes that punitive damage awards encourage private (cont'd)

pertaining to pursuing legal claims can be addressed by a punitive damage award. Owen, supra, at 1296-98.

The notion that plaintiffs receive resources beyond compensation when their injuries are the result of egregious misconduct is rarely addressed in practical terms. Policy concerns surrounding unjust enrichment promote only nominal analysis.[18] It is time to be more forthright.[19]

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persons to bring wrongdoers before the court. Snowden v. Osborne, 269 So. 2d 858 (S.Ct. Miss. 1972).

[18]To be sure, many argue that direct payment to plaintiff is particularly troubling due to what they see as the "tort crisis." The best thinking in the area is that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, New Light on Punitive Damages, Regulation 33, October 1986; Burrow & Collins, Insurance Crisis--Texas Style: The Case for Insurance Reform, 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform, 18 St. Mary's L.J. 673, 695 (1987).

[19]A few states are more straightforward in discussing punitive damages; Hicks v. Herring, 246 S.C. 429, 144 S.E.2d 151, 155 (1965), allows puni- (cont'd)

C. Punitive Damages Improve Business Practices and Upgrade Product Quality.

While there are various concerns associated with punitive damages, there is little dispute that punitive damages have a salutary effect on practices in the insurance industry, improving processes associated with handling claims and providing better, more understandable information to insurers. Levine, supra, at 625; Kornblum & Thornton, The Seismic Impact of Punitive Damages in Actions Against Insurers, 77 Best's Rev. 36, 44 (1976); Levitt, Punitive Damages--Preventative Steps, 1973 Ins. L. J. 332.

In evaluating punitive damages in the insurance industry, one is compelled to take a hard look at what motivates liability insurance corporations. Some

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tive damages to vindicate a private right. Jolley v. Puregro Co., 94 Idaho 702, 496 P.2d 939, 947 (1972), permits punitive damages for "rectification of wrongs"; Oppenhuizen v. Wennersten, 2 Mich. App. 288, 139 N.W.2d 765 (1965), permits punitive damages to address embarrassment.

commentaries are quite frank:

> [L]iability insurers are not in business to compensate injured persons, but, rather, to maximize profits for their stockholders. This they can accomplish only by avoiding the payment of compensation--by denying or defeating as many claims as they can, and by paying as little as possible on the rest. The costs incurred in this process may be expensive . . . but that is precisely how the system is designed to function. Calling it a "compensation system" and expecting it to perform as though it were is as naive as calling a jackass a thoroughbred and expecting it to win the Kentucky Derby.

E. Bernzweig, By Accident Not Design: The Case for Comprehensive Injury Reparations 86 (1980). Given the potential of this corporate inclination, some balancing factor is required. "The disparity in wealth between an insurer and an insured is itself evidence of the need to deter the defendant insurer from wielding the power incident to such wealth in an unfair and oppressive manner." Levine, supra, at 636.

It is argued regularly that compensa-

tory damages are sufficient to cover the needs of injured persons and to provide sufficient deterrence to future misconduct.[20] Such arguments are devoid of empirical support.[21] Many cases where punitive damages are awarded reflect a pattern of misconduct on the part of the defendant, repeated over a period of

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[20]It is also the case that many of the legal mechanisms designed to address corporate misconduct have not lived up to their promise. Schwartz & Adler, Product Recalls: A Remedy in Need of Repair, 34 Case W. Res. 401 (1984).

[21]Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961); Campus Sweater & Sportswear Company v. M.B. Kahn, 515 F.Supp. 64, 104-05 (D.S.C. 1979), holding that punitive damages deter manufacturers from misconduct, encourage the production of safer products, and "serve as a type of private revenge which is carried out in the courts rather than through duels or in back alleys." The court held further "there is no exact monetary standard which can be used as a measure. . . . There is no formula for punitives as the amount to be awarded is particularly within the judgment and discretion of the jury, subject to the supervisory powers of the trial judge over jury verdicts. . . . The main things to be considered are the character of the tort committed, the punishment which should be meted out therefore, and the ability of the wrongdoer to pay." 515 F.Supp. at 105-06.

years, interspersed with various compensatory damage awards. Compensatory awards have not deterred the defendants, prompting the Supreme Court of Minnesota to conclude that punitive damages are particularly effective in preventing repetitive forms of misconduct. Gryc v. Dayton-Hudson, 297 N.W.2d 727 (Minn.), cert. denied, 449 U.S. 921 (1980).

In the insurance industry, a compensatory damage award is likely to be little more than the amount of money to which the insured was entitled under the policy in the first instance had litigation not been initiated. A result of the elimination of punitive damages will be to increase the economic incentive for insurers willfully to deny claims on unjust grounds.

D. The System Mandating Jury Determination of Punitive Damages, Coupled With Judicial Review Is Proper and Sufficient to Assure a Just Outcome.

Giving juries decisionmaking authority in the punitive damage area

based on carefully-evolved state standards conforms with a uniformly-held perception that juries are our best guard against misuse of power. Taylor v. Louisiana, 419 U.S. 522, 530 (1975). We trust juries to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). Since this Court is willing to allow juries to decide matters of life and death, they should be trusted "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 824 (1987).

Implicit in the appellants' challenge is the assertion that juries will, somehow, make inaccurate or unfair determinations for punitive damages. At least three times in the recent past this Court

remarked on the capacity of juries to ass ss punitive damages, not questioning the competence of the citizenry to make intelligent and fair judgments.[22] The confidence of this Court in the ability of juries to make intelligent judgments is reflected at the state level.[23]

In Mississippi, punitive judgments are "left to the sound judgment of the

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[22] City of Newport v. Fact Concerts, 453 U.S. 247, 270 (1981); Electrical Workers v. Foust, 442 U.S. 42, 50-51 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974).

[23] See Brink's v. City of New York, 546 F. Supp. 403, 413 (S.D.N.Y. 1982), holding that for punitive damages the "jury functions in a quasi-judicial capacity and is vested with broad discretion. . . . The court may intervene and set aside a verdict when the amount of the award is so excessive that it shocks the judicial conscience or it appears that it is result of passion and prejudice"; Gulf Atlantic Life Insurance Co. v. Barnes, 405 So. 2d 916, 925 (Ala. 1981), holding "the amount of damages is left largely to the discretion of the jury; however, this discretion is not absolute"; Tri-Tron Int'l v. Velto, 525 F.2d 432, 438 (9th Cir. 1975), holding: "courts will not interfere with the award unless it appears to have been influenced by passion, prejudice, or some improper motive, or unless it is outrageously disproportionate either to the wrong, or the situation or circumstance of the parties."

jurors. This province of the jury should not be interfered with, unless it should appear that the amount awarded was so apparently excessive as to show passion and prejudice. . . ." Yazoo & M.V.R. Co. v. May, 104 Miss. 422, 61 So. 449, 450 (1913). More recent Mississippi decisions suggest some refinements on the review standard.[24]

Although the standard for review in Mississippi provides the jury with considerable latitude, the admonition against excessiveness is not a hollow one. In Jesco v. Shannon, 451 So. 2d 694, 704 (Miss.), cert. denied, 469 U.S. 1073 (1984), the Supreme Court of Mississippi refused to allow a punitive damage

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[24]Commodore v. Bailey, 393 So. 2d 467, 471-72 (Miss. 1981), holding that a jury award for punitive damages can be set aside if it is "arbitrary or unreasonable. The amount cannot be determined by any fixed rule"; Reserve Life Insurance v. McGee, 444 So. 2d 803 (Miss. 1983), suggesting that review is also available for "exceptional causes."

instruction based on an insubstantial assertion of the willfulness of the defendant's misconduct. In addition to conventional review in Mississippi, courts can avail themselves of remittitur pursuant to Miss. Code Ann. § 11-1-55 (Supp. 1986). Through conventional review, remittitur, and properly-phrased jury instructions, the process of awarding punitive damages proceeds in a fair way, fully consistent with the obligation of the state of Mississippi to implement its judicial system in a manner that comports with fundamental due process.[25]

CONCLUSION

It has been demonstrated that neither history, precedent, nor policy support a reversal of the Mississippi Supreme Court. There is no generic principle of propor-

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[25]The Mississippi system conforms with the decisionmaking and review recommendation of § 908 Restatement (Second) of Torts (1979).

tionality commanding fixed ratios or pre-established limits in punitive damage cases. There is no constitutional basis to review punitive damages under the Eighth Amendment. Finally, a close look at punitive damages reveals a useful, fair, and beneficial system.

Respectfully submitted,

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